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No. 500 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

UNITED STATES OF AMERICA upon the relation and for the use of the TENNESSEE VALLEY AUTHORITY,

Petitioner,

v.

W. V. N. POWELSON, assignee and successor in interest of Southern States Power Company, a Corporation, et al.,

---

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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v.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (1 R. 23) is reported in 33 F. Supp. 519. The opinion of the Circuit Court of Appeals (4 R. 2) is reported in 118 F. (2d) 79.

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on March 10, 1941 (4 R. 15). A petition for rehearing was denied on May 10, 1941 (4 R. 18). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925.

QUESTIONS PRESENTED

The respondent insists that the statement of questions presented in the petition (pp. 2-3) is inaccurate, and that only the following questions properly arise:

(1) Whether, in determining just compensation for the lands condemned, their availability and adaptability for water power purposes should be considered.

(2) Whether the Court below, in entering its award, considered incompetent evidence to the prejudice of the petitioner.

(3) Whether, under Section 25 of the Tennessee Valley Authority Act, the Circuit Court of Appeals, upon hearing the appeal from the statutory three Judge District Court, disposed of the same upon the record without regard to the awards or findings theretofore made by the Commissioners or the District Judges, and fixed the value of the property sought to be condemned in the manner contemplated by the statute.

STATUTES INVOLVED

The Tennessee Valley Authority Act of 1933, c. 32, 48 Stat. 58, as amended.

The Federal Water Power Act, c. 285, 41 Stat. 1063, as amended.

STATEMENT

In the main, the statement of the petitioner (Pet. pp. 4-9) sets out the facts underlying this controversy. But the respondent insists that in several instances petitioner has inaccurately stated the facts. Rather than re-recite the facts respondent points out herewith the respects in which it contends the statement of facts contained in the petition is inaccurate.

(a) In stating that the evidence purporting to show that there could be constructed a four dam hydro electric de-

velopment on the Hiwassee River and its tributary, the Nottely River, was offered over repeated objections of the Government, (Pet. p. 5).

(b) In stating (Pet. p. 6, at top) that respondent arrived at a value of the property condemned by capitalizing annual profits from the operation of its planned development.

(c) In stating (Pet. p. 6, at end) that there was no prospect of any such project within the reasonably near future.

(d) In stating (Pet. p. 7, at top) that "at the insistence of the Commissioners and over the objection of the Government evidence was introduced as to the prices paid by the Government for other lands both in negotiated purchases and in condemnation proceedings."

(e) In stating (Pet. p. 8) that the Court below "rejected the Government's contention that under Section 25 of the Tennessee Valley Authority Act it must exercise its independent judgment and fix the value of the lands without regard to the awards or findings previously made." It will appear in the discussion of this question that the Circuit Court of Appeals carefully adhered to the provisions of the Act (*post*, pp. 34-38).

NOTE: Attention is directed to the following statement appearing in petitioner's statement of facts, page 4:

> "The lands here involved were owned by the Southern States Power Company, which has since assigned its property interest and rights arising out of these proceedings to the respondent W. V. N. Powelson, (4) its sole stockholder."
>
> "(4) For convenience, the Southern States Power Company and W. V. N. Powelson will be referred to interchangeably as 'respondent'."

ARGUMENT

On Whether Just Compensation Must Include Compensation for "Power" Value of Lands Taken.

Petitioner's first reason for praying that writ of certiorari issue to review the judgment below (Petitioner's Brief, p. 12) is that the decision below is in conflict with principles established in *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53. An examination of the argument on this point, however, (pp. 12-17) reveals that the petitioner virtually admits that the principles established in that case are not directly applicable to the present case. That case deals with the rights of a land owner in connection with a navigable stream. In this case, we are considering the rights of a land owner in connection with a non-navigable stream. In reality, what the petitioner is seeking is to have this Court—for reasons not discussed in nor applicable to the *Chandler-Dunbar* case—apply to a non-navigable stream principles there applied to a navigable stream.

The petitioner's position can probably best be gathered from its specifications of error, Nos. 1 to 5, inclusive, (Petitioner's Brief, pp. 9-10) and may be stated as follows:

> That the respondent was not entitled to a valuation of its lands, based upon their potential use as a part of a hydro electric development because:
>
> (a) Respondent had no private property in the water power inherent in the flow of Hiawassee River;
>
> (b) Such a development would require a combination of the lands owned by respondent with the lands of others, as to which there was no showing of the possibility of their acquisition;
>
> (c) That there was no reasonable probability that the lands of the respondent could have been developed for such purposes in the reasonably near future, except by the Government.

We will reply to the petitioner's argument on its first reason urged for granting a writ of certiorari by discussing the three propositions just stated, in the order set out.

In the first place, it should be noted that the evidence in the record clearly demonstrates (5 R. 1-16 incl.) and the petitioner in its brief admits (Petitioner's Brief, pp. 13, 15) that the Hiawassee River throughout the section in North Carolina where respondent's land condemned in this action is located is a non-navigable stream; that the head of navigation on the river is in Tennessee 34 miles below the land condemned, and 24 miles below the lowest point on said river at which respondent has any lands or property rights (Ex. R. 203, 3 R. at end).

It is plain from the record (and petitioner makes no claim to the contrary) that no portion of the Hiawassee River, above the head of navigation referred to, is navigable (5 R. 18, 19, 20), and there is no suggestion or evidence to support a contention that any improvement or development of the river above the head of navigation would make any portion of the stream above said head navigable. From beginning to end this case has been tried on that theory. There is nothing in the record that would make any other theory to the least degree tenable.

It further appears from the undisputed evidence that, at the time of the institution of this action, Southern States Power Co., a North Carolina corporation, held title to all of the property condemned—or with respect to which severance damages were allowed—except some property in the State of Georgia on Nottely River, a tributary of Hiawassee River, title to which was held by Union Power Co., a wholly owned subsidiary (1 R. 194); that Southern States Power Co. was formed in 1929 by a merger of Carolina-Tennessee Power Co. and Hayesville Electric Co., both North Carolina corporations, and thereby became the owner of all of the franchises, property and property rights of the merged corporations (2 R. 41); that Carolina-Tennessee Power Co. was incorporated by a legislative charter

in the year 1909 (Ex. R-1, Chap. 76, Private Laws of North Carolina, 2 R. 42); that among the objects of the corporation created by said charter was the development and sale to the public of hydro electric power; that said charter conferred upon said corporation certain franchise rights, including the right of eminent domain, and the right of development of water power and electric power on all streams in North Carolina "not declared by law to be navigable", except in Swain County (3 R. 851, Ex. R-1); and that all of the property and property rights of the respondent (except the Georgia lands above mentioned) are in Cherokee and Clay Counties, North Carolina (Ex. R. 8, at end of appendix to this brief).

It further appears, without contradiction, that Carolina-Tennessee Power Co., acting under powers conferred upon it by its charter, proceeded to acquire property condemned in this proceeding and other property on Hiawassee River in Cherokee County, N. C., as to which severance damages were allowed herein; that it secured for itself the prior right to develop said property for water power purposes (1 R. 28); and that the validity of this right, and its priority, was contested in the Courts of North Carolina, and was established and adjudicated by a series of decisions of the Supreme Court of North Carolina, rendered between 1918 and 1924 (*Carolina-Tennessee Power Co.* v. *Hiawassee River Power Co.*, 171 N. C. 248; 175 N. C. 668; 188 N. C. 128). Attempts to have two of said decisions reviewed by the Supreme Court of the United States failed (252 U. S. 341; 267 U. S. 586).

It further appears, without contradiction, that at the time of the institution of this proceeding Southern States Power Co. was the owner of the property herein condemned as its property, and that this consists not only of lands and flowage rights on both sides of the Hiawassee River, at the point where petitioner's Hiawassee dam was later constructed and for many miles above and below the same, but also of the land underlying the waters of the river be-

tween its banks throughout that section thereof (Ex. R. 8, at end of appendix to this brief). It thus appears that at the date of the institution of this action Southern States Power Co. was the owner not only of said lands on both sides of said river, and the bed of said river, including the dam site, and a large per cent of the reservoir above the same, condemned by the petitioner for development, but of property rights in the non-navigable stream itself, and the prior right to develop the same for water power purposes, just as fully and as exclusively as the State of North Carolina was able to confer said property rights and privileges.

North Carolina, having been one of the thirteen original States, possessed before the adoption of the Federal Constitution every property right and power with respect to the streams within its boundaries "which have always existed in the Parliament in England" (*United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 63).

Upon the adoption of the Federal Constitution, the Federal Government by virtue of the commerce clause thereof secured certain powers and rights with respect to navigable water ways and certain regulatory powers and rights with respect to non-navigable water ways. But subject to the latter, the State of North Carolina retained all of its property rights, powers and interests in its non-navigable streams. *United States* v. *Cress*, 243 U. S. 316, 319.

For the purpose of determining ownership of a river bed or riparian rights, navigability is determined as of the formation of the Union in the original States (*United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377).

It would appear, therefore, that there can be no basis for a contention that the State of North Carolina did not possess, or that it could not and did not confer upon Carolina-Tennessee Power Co. property rights in the flow of that river in North Carolina, or that such property rights were not vested in Southern States Power Co., the successor of Carolina-Tennessee Power Co., at the time of the institution of this proceeding and taken from it herein.

From the time of the institution of this action until the rendering of a decision therein by the United States Circuit Court of Appeals, the petitioner never questioned the fact that the respondent was the owner of the water power rights above referred to, and was entitled to have the value thereof, if there was any, considered in arriving at the just compensation to which it is admittedly entitled. Instead, the efforts of the petitioner were directed to proving, if possible, that said property and property rights were commercially neither adaptable nor available for water power purposes, and that, therefore, nothing should be included in the award for any such adaptability and availability.

It was not until the decision of the United States Circuit Court of Appeals had been rendered—and this Court at about the same time had handed down its decision in the case of *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377—that the position now being discussed seems to have occurred to the petitioner. It thereupon filed in the United States Circuit Court of Appeals a petition to re-hear this case, taking the position, on the authority of the *Appalachian* case, that any rights of the respondent in what it designated "the water power or dam site value of the property possessed by the respondent" were inferior to the Federal right to develop the property, and that the exercise of such superior right involves no taking of anything possessed by the respondent. The petition to re-hear was denied (4 R. 18-19).

As will appear hereafter, there is nothing in the *Appalachian* case to justify this position. On the contrary, it is submitted that in that case the Court closely adhered to the principles established by a long line of prior decisions respecting the power of the Federal Government under the Federal Constitution with respect to the navigable and non-navigable waters of the United States, and that the principles declared and re-affirmed in the *Appalachian* case, when applied to the facts in the instant case, establish be-

yond controversy the right of the respondent to have the water power or dam site value of its property considered in arriving at the just compensation due it for the property taken in this action.

A leading case on the subject of the character and extent of the power of the United States under the Constitution with respect to non-navigable waters is *United States* v. *Rio Grande Dam and Irrigation Co.*, 174 U. S. 690, where the United States sought to restrain the defendant from constructing a dam across the Rio Grande River in the Territory of New Mexico and appropriating the waters of that stream. The Court found that the Rio Grande in the Territory of New Mexico was non-navigable, although it was navigable from its mouth upstream for a considerable distance. The Court limited its inquiry ("properly", it says) to the effect of the proposed dam and *appropriation* of waters upon the navigability of the Rio Grande in the section where it was navigable, and to the extent of the right of the Government to interfere if the proposed action of the defendant tended to destroy such navigability. As a basis for this consideration, the Court laid down the following principles, which, as far as we have been able to discover, have never since been questioned by this Court:

1. Under the common law every proprietor of lands on the banks of a river has an equal right to the use of the water which flows in the stream adjacent to his lands, without diminution or alteration. He has no property in the water itself, but a simple usufruct while it passes along.

2. In States which have adopted the common law (North Carolina is one) a State may change this common law rule and permit the appropriation of the flowing waters for such purpose as it deems wise.

3. On this power of the State to change the common law there are two limitations:

(a) A State cannot by its legislation destroy the right of the United States as an owner of land

bordering on a stream to the continued flow of its waters. (That situation, of course, does not exist in the present case.)

(b) The right of the State is limited by the superior power of the general government to secure the uninterrupted navigability of navigable streams within the limits of the United States, and that Government has the right to take all needed measures to preserve the navigability of such navigable water courses.

On the basis of the foregoing, the Supreme Court in the *Rio Grande* case directed that inquiry be made into the question of whether the intended acts of the defendant in the construction of a dam, and appropriation of the waters of the river, would substantially diminish navigability of the river within the limits of such navigability, and, if so, to enter a decree restraining such acts to the extent they would so diminish.

The importance and fundamental character of the decision in the *Rio Grande* case is evidenced by the fact that it is cited not less than seven times in the opinion in the *Appalachian* case above referred to.

From this decision it is clear that Federal Courts recognize that a citizen of the State, by proper grant or franchise from the State, may acquire a property right in the flow of a non-navigable stream, which right, however, he must exercise so as not to adversely affect "commerce" on a navigable water way.

Herein lies one distinction between a navigable and a non-navigable stream. In the former, which is the highway of commerce itself, the power and control of the United States is absolute. No citizen can acquire a property right as against the absolute power of the Federal Government over the stream, except, of course, by grant or license from the Government itself. It follows, as a necessary corollary, that no use of a navigable water way by the Federal Government can involve any taking of private property therein which results in a liability to pay just compensation for

property taken under the Fifth Amendment. This is the principle which underlay the decision of the case of *United States* v. *Chandler-Dunbar Co.* above referred to, and the case of *Continental Land Co.* v. *United States*, 88 Fed. 2d 104 (CCA 9th), both cited in petitioner's brief.

The controlling effect of this distinction with respect to the rights of a citizen in the flow of a stream under grant from the State is clearly recognized in the case of *United States* v. *Appalachian Electric Power Co.*, cited above. That was an action by the Government for an injunction against the construction or maintenance of a dam by the defendant on New River in the State of Virginia, otherwise than under a license from the Federal Power Commission. The conditions in the license admittedly went beyond a mere regulation of the use of its property by the defendant, so as not to adversely affect navigation below in the admittedly navigable section of the river. As this Court points out, the decision of the question raised "requires, preliminarily, a decision as to the navigability of the New River", meaning, as appeared later, navigability at the point where the dam was proposed to be maintained. The Court proceeds to examine at length into the fundamental question of fact as to whether New River at the point referred to was navigable or non-navigable. The consideration of this question of fact takes up about two-thirds of the opinion in the case, and would obviously never have been undertaken by the Court if it had not been "required" for the decision of the case. Having found as a fact that New River at the point referred to is a navigable water of the United States, the Court next observes "the determination that New River is navigable eliminates from this case issues which may arise only where the river involved is non-navigable."

Obviously, this Court recognizes that in passing judicially upon the exercise by the Federal Government of its powers under the commerce clause of the Federal Constitution with respect to water ways, a distinction is to be made between navigable and non-navigable streams.

A little later in the opinion the Court, in a paragraph, summarizes its understanding of the power of the Federal Government with respect to navigable waters, and makes the following statement:

> "The Federal Government has dominion over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property. 'That the running water in a great navigable stream is capable of private ownership is inconceivable.' Exclusion of riparian owners from its benefits without compensation is entirely within the Government's discretion."

It is perfectly obvious that these statements and conclusions can only apply to navigable streams. If they were equally applicable to non-navigable streams, this Court would have been under no necessity of considering at great length the facts in the case on the question of navigability. It would only have been necessary for the Court to say that the Federal Government, under the commerce clause, has dominion over the water power inherent in the flowing streams; that their flow is not capable of private ownership, and that the exclusion of riparian owners from its benefits without compensation is entirely within the Government's discretion. That would have settled the case.

This Court recognized the same principles in the case, *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 69, heretofore frequently referred to, saying:

> "We may put out of view altogether the class of cases which deal with the right of riparian owners upon non-navigable stream to the use and enjoyment of the stream and its waters. The use of the fall of such a stream for the production of power may be a reasonable use consistent with the rights of those above and below. The necessary dam to use the power might completely obstruct the stream, but if the effect was not injurious to the property of those above, or to the equal rights of those below, none

could complain, since no public interest would be affected."

Respondent readily admits the existence of the regulatory power of the Federal Government with respect to non-navigable streams for the purposes heretofore pointed out. It also recognizes that the Government, under the commerce clause, is not limited with respect to non-navigable waters to action which is merely regulatory, that is, which merely prevents a use that would have an adverse effect on commerce in a navigable stream. It may go further and undertake any project, no matter how comprehensive, suitable to the end of promoting commerce, and this may be a project for flood control or to improve navigation, or for other similar and related purposes. Under this power and in carrying out any such project, the Government may enter upon non-navigable stretches of a stream, build dams, and pursue other means suitable to the end in view, namely, promoting commerce.

The extent of this power is fully set out in the very late case of *State of Oklahoma* v. *Guy F. Atkinson Co.*, —— U. S. ——; 85 L. Ed. 977, decided June 2, 1941. It was under this power that the petitioner herein, under authority given it by Congress, condemned the property taken in this action.

It appears, therefore, that the power of the Government under the commerce clause, as applied to water ways, may be considered from two aspects; one, the power to preserve commerce, and the other, to promote commerce. Under the former, as pointed out in the *Rio Grande* case, the Government is concerned with preventing uses of the non-navigable portion of a stream by the State, or one claiming under it, in such a way as to adversely affect the navigability of navigable waters. Action to this end will be regulatory and may include anything appropriate and plainly adapted to the permitted end, namely, preserving the navigable capacity of a navigable stream.

Action under this aspect of the power will not involve any taking of property, though it may restrict, to the de-

gree necessary, the free use by a property owner of property or a property right in connection with a non-navigable stream. Except to the extent of the restriction, the title and rights of the property owner will not be disturbed.

Under the other aspect of the power, the Government acts to promote commerce with respect to a navigable water way, as, for example, to improve navigation. As long as the acts performed by the Government under this aspect are confined to the navigable portion of the stream, no taking of private property for which compensation need be made is involved, for, as pointed out in the *Chandler-Dunbar* case, there can be no such taking of private property in a navigable stream.

When, however, the acts of the Federal Government in promoting commerce with respect to a navigable water way extend beyond the confines of the navigable portion of the water way, as, for example, to the building of a dam on the non-navigable portion of the stream, then there is a taking of property for which just compensation must be made.

On this point see *United States* v. *Cress*, 243 U. S. 316—an action to recover damages for the taking of property by the United States. It there appeared that a property owner owned a tract of land on a non-navigable tributary of the navigable Kentucky River, upon which there was a mill, and that the United States, in exercise of its powers under the commerce clause, erected a lock and dam in the river, which backed up the water in the tributary to an elevation only one foot below the top of the property owner's mill dam, destroying its power. It was held by this court that this constituted a taking of property under the Fifth Amendment, for which compensation must be made. Neither the land of the property owner, nor his mill, was actually flooded, but the flow of the stream in which he had a property right, under Kentucky law, was impeded. The United States erected its improvement in a navigable water way, but the effect of its act extended beyond the boundaries

of the navigable section of the stream, hence there was a taking of private property, fo. which compensation must be made.

In the *Atkinson* case above the same obligation seems to be recognized. The petitioner in its petition, in discussing this phase of the question, has pointed to no case which holds to the contrary.

But the petitioner contends "the operation of respondent's proposed development would have curtailed navigation on the lower Hiwassee many months of the year and would have had a substantially adverse effect on navigation on the Tennessee River" (Pet. p. 15).

Even if this were true, which is denied, it would not follow that respondent was not entitled to have the water power value of its lands considered in arriving at the just compensation to which it is entitled, if there is such value. An adverse effect of the operation of respondent's hydro electric development on navigation in the navigable stream below might result in regulatory measures which might compel respondent to change, to some degree, its method of operation, and that might result in lowering the value of the property for water power purposes. But such lower value should still be considered in arriving at the just compensation above referred to.

That an operation of respondent's development in such a manner as not to adversely affect navigation on the navigable portion of the Hiwassee River was entirely feasible, is shown not only by the testimony introduced by respondent (2 R. 284, 285; 1 R. 114, 115, 172), but also by the petitioner's petition itself, which includes a statement (Pet. p. 16, Note 9), attributed to the Federal Power Commission, relating to a proposed hydro electric development on Hiwassee River above the Town of Murphy. That statement declares that said project "involves storage and its management to such an extent that it might be a serious detriment to navigation or materially improve it below."

The same statement adds: "A license, if issued, would contain such conditions as deemed necessary to protect navi-

gation. It is not believed these would add any serious burden to the operation of a power project" (1 R. 201-202).

Furthermore, Mr. Barker, the only witness offered by the petitioner, in attempting to show that the operation of respondent's project might adversely affect navigation in the navigable portion of the river, admitted that one form of operation possible to the respondent, namely, to generate continuously at the rate of 67,000 K.W. "would have no adverse effect" on navigation below (3 R. 488, 489) (See Ex., R. 228, 3 R. at end).

Thus, Mr. Barker concedes that the mere construction and maintenance of respondent's dams across Hiwassee River could not give rise to a valid complaint that they adversely affected navigation; and that no such valid complaint in respect of said dams could be made unless directed against the *manner in which they were being operated.*

An examination of Mr. Barker's testimony reveals that he arrived at his conclusion that the operation of respondent's developments would adversely affect navigation below by considering the effects of a method of operation which respondent had no idea of following (3 R. 478, 479, 483; 1 R. 313-315). All of the tribunals below had before them the testimony of Mr. Barker, and it must be assumed they considered it in appraising the value of respondent's property taken.

It is perfectly obvious that in the operation of respondent's multiple dam hydro electric project—in which a plurality of developments, each containing large water storage, are located one above the other (Exhibits R. 17, R. 203 and R. 249, 3 R. at end)—it is the manner in which water is released from the dam lowest on the river which determines the effect of the operation of the development on the navigable waters below. The dam at lowest elevation in respondent's project would be the Appalachia dam. It is also perfectly obvious that the amount of power generated from this unit of the development and the amount of water released into the river below from the operation of this dam

are directly proportionate one to the other. For example, in order to double the generation of power, the flow through the turbines must be doubled.

Exhibit R. 229 (3 R. at end) shows two subsidiary charts, A and B(1). These two charts show how respondent's four integrated developments would, in their practical operation, substitute for the natural flow at the Appalachia dam site, which is subject to wide natural variations (Chart A), a regulated flow which is subject to very small variations (Chart B). The total quantity of power generated, as shown by the green areas, is the same on Chart A as on Chart B. But there is a vast difference as shown by these charts in the variations from the average both in power generated at the Appalachia development and in the rate of flow of water through its turbines.

While it is true that the scale to measure the height of the monthly green areas is in terms of power, namely, kilowatts, the heights of the monthly green areas also correctly show variations in the average monthly rates of flow, because the power generated varies as the flow through the turbines varies.

Particular attention is directed to the note at the bottom of Ex. R. 229, from which it appears that as the result of storing the waters of the river in the manner contemplated by respondent's development (See Ex. R. 17, 3 R. at end), the production of dependable power is increased 14.2 times over the continuous dependable power from the natural flow of the river. Correspondingly, the minimum continuous flow of the waters of the river through the turbines at the Appalachia development would be 14.2 times the minimum natural flow of the river.

From the testimony, the conclusion is overwhelming that the method of operation contemplated by respondent, and possible to any owner of the property using it for hydro

(1) For convenience a copy of Ex. R. 229 is inserted at the end of this brief.

electric development, would be the method most advantageous to the owner of the property from a business standpoint (1 R. 114, 115) and, at the same time, would very greatly improve the navigable capacity of the Hiwassee River throughout its navigable section (2 R. 285).

The completion of the Tennessee Valley Authority Chickamauga dam across Tennessee River, begun before these proceedings were commenced (Ex. R. 254 at end of this brief), has backed water up Hiwassee River to a point within 10 miles of the head of navigation thereon (Ex. R. 203, 3 R. at end), and has created deep navigation in that section of the river (Ex. R. 405 at end of this brief; 2 R. 286-288) which would not be diminished if no water ran down Hiwassee River. There is nothing in the record to show that said 10 miles of river ever supported a commerce or that it had ever been improved by the Government for navigation.

Again, the petitioner contends (Pet. p. 17) that Congress, by specifically authorizing the construction of Hiwassee dam by the Tennessee Valley Authority, made a determination which precluded the respondent from proceeding with its plan, and thereby precluded it from asserting a right to use its lands for hydro electric purposes, and from recovering their water power value thereafter in this proceeding.

It further suggests (Pet. p. 16) that under Sec. 7 (b) of the Federal Water Power Act the Federal Power Commission would have been obligated to withhold its consent for respondent's development if it had found that this development should be undertaken by the United States, and implies that the respondent could not thereafter proceed with its plans, or recover water power value on a subsequent taking of its property.

It is conceivable that a Federal agency, acting under Congressional authority, might suggest to Congress the advisability of the Government's undertaking a project affecting privately owned property for the purpose of pro-

moting commerce, or that Congress might direct a Federal agency to undertake such a project, and that the effect of this action might be to prevent, for the time being, the use by the owner of a property affected by the project for a purpose inconsistent therewith. But such an effect certainly could only be temporary and continue for only such period of time as was reasonable to enable Congress to consider and act, if it desired, upon the recommendation made to it, or to enable the Federal agency to prepare to carry out the instructions of Congress.

It cannot be that the effect above suggested could be permanent and continue without limit in the absence of further action by Congress or the Federal agency; for in that case, the effect of the Congressional act or of the recommendation of the Federal Power Commission would be to take the property of the owner, and for that the owner certainly would be entitled to just compensation.

If a recommendation of the Federal Power Commission or an act of Congress of the character above referred to was followed in due course by a condemnation proceeding and a taking of a property of the character of that of respondent taken in this action, it would obviously preclude the property owner from asserting a right to use its lands for hydro electric purposes. But it would not follow that when this right was destroyed liability to pay just compensation therefor would not immediately arise.

On this point the *Chandler-Dunbar* case, hereinbefore frequently mentioned, is directly in point. In that case the defendant was the owner of a strip of land bounded on the north by the St. Marys River (Sault Ste. Marie), a navigable water way connecting Lake Superior with Lake Huron, and bounded on the south by a ship canal owned by the Federal Government which provided means whereby navigation between the lakes, impeded by rapids in the St. Marys River, was made possible. This strip of land was the only land over which could be constructed another canal with necessary locks to care for increased navigation.

By an Act of Congress (Chap. 264, Stat. at L., p. 815, Sec. 1) it was declared "that ownership in fee simple absolute by the United States of all lands and property of every kind and description north of the present St. Marys Falls Ship Canal throughout its entire length and lying between said Ship Canal and the international boundary line on Sault Ste. Marie in the State of Michigan is necessary for the purpose of navigation of said waters and the waters connected therewith."

Thereafter, the action referred to above as the *Chandler-Dunbar* case was instituted for the purpose, among other things, of condemning the strip of land above referred to. The respondent in that case contended that there should be considered, in determining the just compensation to which it was entitled for the taking of the strip of land referred to, its value "for canal and lock purposes." It was allowed an additional $25,000 for this value in the Court below, and this allowance was approved by this Court, which said:

> "The exception taken to the inclusion as an element of value of the availability of these parcels of land for lock and canal purposes must be overruled. That this land had a prospective value for the purpose of constructing a canal and lock parallel with those in use had passed beyond the region of the purely conjectural or speculative. That one or more additional parallel canals and locks would be needed to meet the increasing demands of lake traffic was an immediate probability. This land was the only land available for the purpose . . . Although it is not proper to estimate land condemned for public purpose by the public necessities or its worth to the public for such purpose, it is proper to consider the fact that the property is so situated that it will probably be desired and available for such a purpose."

In principle, we have the same situation in the instant case which this Court was considering in the *Chandler-Dunbar* case. In each instance, the respondent was the owner of property adaptable and available for a special use

which gave the property an increased value. In each case Congress acted, pursuant to the Federal power under the commerce clause, to appropriate the property for the use of the Government. This was followed by a proceeding to condemn the property, and thereby its use by the owner for the special purpose was made impossible. Just as this Court held in the *Chandler-Dunbar* case that the additional value of the property for the special use for which it was adaptable and available should be considered, so in this case respondent contends that the special use for which its property is adaptable and available, namely, development for water power purpose, should be considered in arriving at just compensation.

It is also argued by the petitioner that in order to proceed with its development, respondent would have been compelled to secure an approval of its plans for the construction of its dams and the operation thereof from the Tennessee Valley Authority.

It is submitted that in exercising such authority the Tennessee Valley Authority could not act arbitrarily or capriciously, and there is no presumption that it would attempt to do so. Plainly, the matters with which it would have been concerned would have been the preservation of its plan for the unified development and regulation of the Tennessee River system as it might be affected by the location of respondent's dams, the design and stability of the dams, and the method of their operation after completion.

It is only necessary to compare respondent's Exhibit R. 8 (at the end of the appendix to this brief) showing the location of respondent's four adopted dams with the report of the Tennessee Valley Authority to Congress in March 1936 of its proposed unified development of the Tennessee River system (Exhibit R. 204, map opposite p. 96) to see that as far as location is concerned, respondent's locations met with the entire approval of the Tennessee Valley Authority, and the Authority envisaged a development with dams at exactly the same locations.

As far as design and stability of respondent's proposed dams are concerned, it appears from the record that they were approved by the engineers of the Tennessee Valley Authority who testified before the Commissioners (1 R. 359-361; 2 R. 353). It further appears that the heights of respondent's dams (Exhibit R. 17, 3 R. at end) are identical with the heights of dams at the same respective locations shown on the chart found in Exhibit R. 204 above referred to, opposite page 96.

It therefore appears affirmatively from the record that except as to the method of operation, the plan of respondent for its development met the approval of the Tennessee Valley Authority and was not in conflict with the Authority's plans for the unified development and regulation of the Tennessee River system.

The manner of operation, as proposed by respondent, and the effects thereof, have heretofore been discussed, and the beneficial effects of such operation in aid of the plan of the Tennessee Valley Authority amply demonstrated.

The Possibility of Acquiring Other Lands.

Turning now to the second ground urged by petitioner for excluding "power" value in arriving at just compensation, the petitioner contends that the development of respondent's property for hydro electric purposes would require a combination of lands owned by respondent with lands of others as to which there was no showing of the possibility of their acquisition. (Pet. pp. 4-5, Specifications of Error No. 4, Pet. pp. 22-23). It is admitted that respondent under its charter possessed the power of eminent domain (Pet. p. 22, Note 13); and it appears that under this power, and by purchase, it had acquired the four dam sites needed for its development, and much of the additional land required—approximately 22,000 acres—(1 R. 34). Obviously, it could proceed, under its power of eminent domain, to acquire the remaining lands, unless some part thereof was in an ownership not subject to condemnation.

But petitioner insists that the respondent, in order to complete its development, would have been required to acquire lands in Tennessee and in Georgia, as well as lands owned by the United States, the State of North Carolina, and by public utilities, none of which could have been condemned or otherwise acquired by it (Pet. p. 22, Note 13). An examination of the evidence shows that petitioner is in error in making this contention.

The only situation under which respondent would have required any land in the State of Tennessee would have been if it had placed its Appalachia Dam at the lower of its two Appalachia dam sites. The upper site located about one mile above the lower, and all of the lands that would have been over-flowed by a dam thereat, belonged to respondent, and are entirely within the State of North Carolina (Ex. R. 8 attached hereto, pursuant to stipulation). Its use was entirely feasible (1 R. 184, 185).

As to lands in Georgia, it appeared that title to these lands was in Union Power Company, a wholly owned subsidiary of Southern States Power Co., which is a Georgia corporation and possesses the power of eminent domain in that State (also see Stipulation as to power of eminent domain of Union Power Co.).

As to lands of the United States, the only land located within the boundaries adopted by respondent for its development that could be so classified is 65 acres of lands of the Eastern Band of Cherokee Indians (2 R. 290, 291). As to this property, it appears that its situation is such that it is entirely practicable, if the right to flood it could not be secured, to construct dykes on private land, and also install thereon pumping plants and thus block off the Indian land from respondent's reservoirs, thereby fully protecting said lands from flooding (2 R. 291, 292).

As to the properties of utilities, it appeared that one was a stretch of railroad owned by the Tennessee-North Carolina Railway Co. The President of this company testified that he knew his company would sell its entire road

and equipment to respondent for $100,000.00 (See Appendix to this Brief, page 41).

Another utility property was a small hydro electric development on Hiwassee River near the Town of Andrews in Clay County, N. C. (Marked "Andrews Dam" on Exhibit R. 8, attached), which would be flooded by respondent's Murphy reservoir. It appeared that the officials of this utility had expressed themselves as entirely willing to co-operate with respondent and to sell their small development when respondent needed to eliminate it (1 R. 159, 160).

The remaining utility affected is a single track section about two miles long of the Louisville & Nashville R. R., about four miles from the Town of Murphy, which would have to be re-located. Mr. Powelson testified that such re-locations were frequently necessary in hydro electric developments, and that they customarily presented no difficulties (1 R. 167).

Respondent contends that it does not appear from the record that the State of North Carolina had any interest in any property necessary to the respondent for its development. In any event, in view of the action of the State in granting to respondent the exclusive right to develop water power on Hiwassee River within the State, it is hardly conceivable that the State would not co-operate with the respondent in making its development.

Considering the progress respondent had made in acquiring property desired by it for its development, and its right of eminent domain, as well as the friendly attitude of the owners of said utilities, which respondent might not be able to condemn, there is no basis for the contention that respondent could not have proceeded successfully in acquiring the property necessary to it in an orderly manner and at reasonable cost.

The test to be applied in weighing this contention of the petitioner is found in *Olson* v. *United States*, 292 U. S. 246, 256, where this Court said:

> "The fact that the most profitable use of a parcel can be made only in combination with other lands

does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect market value. Nor does the fact that it may be or is being acquired by eminent domain negative consideration of availability for use in the public service."

As to Probability of Development.

But finally, petitioner, in discussing the inclusion of "power" value in the award, says that respondent was not entitled to a valuation of its lands based upon their use as a part of a hydro electric development because there was no reasonable probability that the lands of respondent could have been developed for such purpose in the reasonably near future, except by the Government (Pet. pp. 22-23).

In pursuing this argument, the petitioner urges that if respondent had intended to make its development, it would have done so before the date upon which this action was instituted. That argument fails to take into account the facts of the case as revealed by the record.

It appears that for a long period of time prior to the year 1924 respondent was engaged in litigation with another power company which contested its prior right to the development of Hiwassee River for water power purposes. In that litigation the rival power company, Hiwassee River Power Co., claimed that respondent had not been diligent up to that time in exercising its claimed right of development. That issue was decided in favor of respondent in litigation which was carried on for ten years from 1914 to 1924 (1 R. 19, 28); *Carolina-Tennessee Power Co.* v. *Hiwassee River Power Co.*, 186 N. C. 179.

Obviously the pendency of this litigation prevented respondent from proceeding with the project at that time (1 R. 172, 173). After the litigation was concluded, it appears that respondent proceeded to acquire additional lands and dam sites needed for its development, and spent large sums of money for necessary surveying and engineering research (1 R. 19, 20, 31, 185).

About 1930 economic conditions in this country became such that it was not commercially wise or feasible to proceed with the actual construction of dams for the time being. It appears from the findings of the United States District Court that respondent was engaged in carrying on its surveys and engineering investigations during the years 1931, 1932, 1933 and 1934 (1 R. 31). By 1935 this condition had improved and respondent was of the opinion that the time was about ripe for the carrying out of the development plans (1 R. 11, 30, 110).

That respondent was correct in its judgment is confirmed by no less authority than one of the Directors of the Tennessee Valley Authority and a Regional Director for the Federal Power Commission. The former, Mr. Lillienthal, testifying in April 1937 before a Sub-Committee of the Committee on Appropriations of the House of Representatives (2 R. 117) said:

> "There has been an impression for a time that there was no need for this power; that there was a vast amount of power which would lie idle. The actual facts do not bear that out. On the contrary, the estimates made as to the surplus have been disproved by the facts. . . . The basis of all of our estimates to this committee is the same basis that businessmen would employ in determining upon investments from which they expect to derive revenue; namely, an estimate of the market conditions. The need for power in the Tennessee Valley area has been recognized for some years. It has been classified as a deficiency area by the Federal Power Commission in its careful estimate made under the direction of the Congress as to power resources."

Mr. Thomas, the Regional Director of the Federal Power Commission at Atlanta with jurisdiction over eleven southeastern States, including North Carolina, testified, among other things, (2 R. 369-377) that he had made a study of the power requirements of the utilities who were parties to the so-called Eighteen Power Company suit to ascertain, on the

basis of the productive capacities of the companies at the end of 1936, whether there would be a shortage of power to supply estimated demands, and that there would be a shortage.

Testifying specifically as to the available or contemplated demand a few years in the future (1943) for the capacity that the Hiwassee River developments would produce, the witness said: "There is no doubt there is a demand for that amount, if there are ways found to get it to points of consumption, that is, whether there are lines" (2 R. 380).

It also appears from the evidence that many years will ordinarily be consumed by the owners of an undeveloped water power in getting together their lands, making their surveys and investigations, and going through litigation and changes in business conditions before actual development occurs (1 R. 270).

In view of the foregoing testimony from sources which the petitioner cannot well question, it is perfectly apparent that at the time when respondent's lands were condemned conditions were ripe for the contemplated development, and that a demand existed for the power that would be developed.

Petitioner also seeks to throw doubt upon the ability of respondent to finance the development. Evidence in the record is to the contrary (3 R. 832-834). Also, it appears from the record that there were at least two large public utilities selling power in this territory (Ex. R. 210, 211, 3 R. at end); and it is reasonable to suppose that they would have been interested in respondent's property at a fair market price in view of the rapidly growing shortage in power in the territory which they were serving, which they could only meet by securing additional sources of supply.

In view of the peculiar adaptability and availability of the lands of respondent for hydro electric development, the existing shortage of power in the territory which would be served by the development, and the fact that respond-

ent had made such great progress in assembling the necessary property and thoroughly evaluating all of its possibilities from an engineering standpoint, it cannot seriously be contended that a purchaser desiring to buy the property just before the institution of this action would not have given consideration to the value of the property for the purpose for which it was preeminently suited.

The three Commissioners, the three Judge District Court and the United States Circuit Court of Appeals each separately considered the facts disclosed by the record. Each separately came to the conclusion that respondent's property possessed a value based upon its potential use as a part of a hydro electric development. Each found that the property was both adaptable and available for such use; that the combination of lands required for the development by the respondent was entirely possible; and that this possibility was reasonably sufficient to affect market value.

It is submitted that there is nothing in this aspect of the case which should lead this Court to grant petitioner's prayer for writ of certiorari.

Did the Court Commit Error in Considering Evidence of Profits?

Petitioner further contends that the Court, in arriving at its award, erroneously took into account money spent by respondent in promoting its development, and considered evidence of possible future profits from said proposed development (Pet. pp. 10, 21-23).

Respondent contends:

(a) That the evidence complained of was competent.

(b) It was in effect so admitted by counsel for petitioner (3 R. 842).

(c) Petitioner, through its witnesses, endorsed the method of proof adopted (3 R. 591, 592, 629, 630).

(d) The presumption is that the evidence, if incompetent, was not considered by the Court.

(e) From their opinions, it is apparent that neither the District Judges nor the Circuit Court of Appeals based their award on this testimony.

The property condemned in this case was unique in its makeup and, due to the fact it comprised an integrated power development with great water storage, had a value indeed very unusual (Ex. R. 17, 3 R. at end). For a number of years respondent had been engaged in bringing this development into a single unit.

It did not come within the class of property that is ordinarily dealt with on the open market (1 R. 117, 260, 261), hence it was necessary for the Court in arriving at its true market value to take "into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining". *Olson* v. *United States*, 292 U. S. 246 (257); *Shoemaker* v. *United States*, 147 U. S. 282; *McCandless* v. *United States*, 298 U. S. 342.

The evidence offered by respondent is directly in line with the views of petitioner's experts, who testified that the sound method for determining the commercial feasibility of a water power project was to estimate the output of power, cost of development, etc. (3 R. 591, 592, 629, 630).[2]

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[2] One of petitioner's witnesses, Mr. Uhl, on direct examination (3 R. 591, 592) laid down ten principal points to be considered in the determination of market value of riparian lands for water power, as follows:

"Q. Now, Mr. Uhl, what are the principal points to be considered in the determination of market value of riparian lands for water rights (power)?

"A. *First*, I would say the market price for power and its extent, and its distance from the city (site).

Second, I would say competitive sources of power.

Third, the extent of engineering information available regarding the site.

(*Footnote continued on next page*)

Indeed, counsel for petitioner insisted before the Commissioners that there had to be proof of the character now objected to, stating (3 R. 842):

> "If this respondent simply proved that these lands are adaptable to water power construction, that is the building of dams, that (then) he has gone only the first step. He has got to show that they are adaptable at a profit."

It is submitted not only that the petitioner is estopped from making the contention now under discussion, but that the evidence was competent. *McCandless* v. *United States*, 298 U. S. 342; *Ford Hydro-Electric Co.* v. *Neely*, 13 Fed. (2d) 361, 362, *certiorari denied*, 273 U. S. 723; *Union Electric L. & P. Co.* v. *Snyder Estate Co.*, 65 Fed. (2d) 297, 304; *Olson* v. *United States*, 292 U. S. 246 (257).

> *Fourth*, the natural advantages and disadvantages of the site.
>
> *Fifth*, the probable cost of construction.
>
> *Sixth*, the pondage and storage possibilities.
>
> *Seventh*, the stream flow characteristics.
>
> *Eighth*, the time when the development may be carried on.
>
> *Ninth*, possibilities of financing.
>
> *Tenth*, the yearly cost of producing the estimated output.
>
> "Q. Now does that complete it?
>
> "A. In my opinion those are the principal points to be considered."

And Mr. Ayres, for petitioner, redirect examination (3 R. 629, 630) stated:

> "Q. In your opinion is it a sound or an unsound way to determine commercial feasibility of a project to estimate the amount of output, the cost of development, the amount of income, and the amount of annual charges, and thereby arrive at some figure as to where (whether) you would have a net income or surplus; is that a sound way to go about it?
>
> "A. *That is the only way I know of to go about it.*"

When this case came on for hearing before the three district judges upon exceptions petitioner (1 R. 332) filed motion to strike respondent's evidence complained of, with the request that if the motion was allowed, petitioner's evidence to like effect also be stricken; and, at the close of the evidence, petitioner made a like motion to strike certain additional evidence taken before the three district judges. The record does not disclose whether any rulings were made on these motions either by the district judges or the Circuit Court.

In any event, there is an abundance of evidence in the record, other than that complained of, to support the award; and even if it were admitted that the evidence in question was incompetent—which it is not—the presumption is that the Court (when the trial was without the intervention of a jury) acted only upon the competent evidence. *United States* v. *King*, 7 Howard, 833, (854, 855), 12 L. Ed. 934 (943, 944); *Sinclair* v. *United States*, 279 U. S. 749, (767); *Topolewski* v. *State* (Wis.), 7 L. R. A. New Series, 756, (760); *Davis* v. *Seattle*, 44 A. L. R. 1490, 2 R. C. L. 252.

In its brief before the Circuit Court of Appeals, page 13, petitioner, in referring to this evidence complained of, stated:

> "While the court below adopted respondent's theory, it was apparently unwilling to rest its award upon this evidence."

In the opinion of the Circuit Court of Appeals, the Court says:

> "As the experts of respondent placed an excessive value on the property for power purposes and the experts of the petitioner placed no value at all on it for such purposes, the court below was not bound to except the estimates of either but was called upon to exercise its best judgment as to value on the basis of all the facts in evidence. . . ." (18 Fed. (2d) 84).

It thus appears that neither the District Court nor the Circuit Court of Appeals based its award on the evidence now being considered.

What Petitioner Paid for Other Lands.

Petitioner contends (Pet. pp. 10, 23-24) that it was error for the tribunals below to take any notice of what the petitioner had paid for other lands in this water power development.

It asserts (Pet. p. 7) that this evidence was introduced "over the objection of the Government". The record, however, does not bear out these claims.

The evidence complained of is Exhibit 3-L (3 R. 865-874), (Exhibit 3-N, see footnote on page 874 of 3-R). Examination of this exhibit will show that instead of being a list of prices paid by the Government for lands in petitioner's reservoir not owned by respondent, it is a list of appraised values of such tracts of land made by the Land Acquisition Department of the Tennessee Valley Authority for the purpose of determining the fair market value of such tracts, for the use of the Authority in attempting to acquire the same by purchase.

It will further appear from the testimony of Mr. Snyder, Chief of the Land Acquisition Department, that a large percentage of said tracts were acquired at the appraised values and that none were acquired for a greater or a less price than the appraised value as shown on said exhibit, but it is impossible to tell from the exhibit which tracts petitioner acquired by purchase (3 R. 584-585).

There is no evidence as to how much the Tennessee Valley Authority paid for any tract acquired by condemnation (see explanation 5 R. 41).

Again, the evidence complained of was not offered by respondent (3 R. 586, 587). On the contrary, the exhibit was prepared by petitioner and offered by it as a part of its testimony (id.). It is true the Commissioners suggested evidence of this type, but at the time the exhibit was offered the petitioner stated it was perfectly willing to offer it (5 R. 29). So, in effect, what the petitioner is now doing is

asking this Court to grant a writ of certiorari for the alleged erroneous admission of testimony it offered itself.

Furthermore, it appears from the opinion of the Circuit Court of Appeals that the only item of this character referred to by the Court was the total amount of the expenditures of the petitioner in acquiring lands in the reservoir other than those owned by respondent. In view of the evidence of Mr. Snyder (3 R. 585), this amount represented the fair market value of these lands as determined by the petitioner itself. It further appears that the only use which the Circuit Court of Appeals made of this item of evidence, which represented the amount petitioner expended to become the owner of substantially one-fifth of the reservoir, was to compare it with the total award of $976,289.40 which it made to respondent on the basis of other evidence for the remaining four-fifths of the reservoir, including the damsite.

The petitioner complains at great length (Pet. pp. 19-21) of alleged errors in the basis adopted by the Circuit Court of Appeals in making the comparison just referred to. Respondent does not feel disposed to follow petitioner into its mathematical intricacies, but would merely refer the Court to petitioner's Exhibit O, introduced as a part of the testimony of petitioner's witness, Sayford, (3 R. 879). This witness undertook to arrive at the value of respondent's lands on the basis of the cost to the petitioner of other lands in the reservoir, excluding lands not comparable, it was claimed, because of their location and improvements thereon. On this basis, as disclosed by the above exhibit, and on petitioner's own showing, respondent's lands had a relative value of $614,028.00, without including anything for power value.

As pointed out above, all of this evidence was offered by petitioner, and it is in no position at this time to complain that it was received by the Court.

Value of Lands to the Government.

For some reason not clear to respondent, petitioner assigns as one of the questions presented (Pet. p. 3) whether it is proper to consider, in determining just compensation, the value to the Government of the land taken, and makes as an assignment of error (Pet. p. 10, Assignment 9) the taking into consideration of such value.

There is nowhere in the record any evidence of the value to the Government of the land taken in this proceeding. Petitioner seems to feel that the evidence offered by it, hereinbefore considered, of the fair market value of other lands in its reservoir, as determined by it, and the use made by the Court below of this evidence, constitutes a consideration of the value to the Government of the lands taken herein. It is plainly in error in reaching this conclusion, for certainly, the fair market value of lands in the reservoir other than those owned by respondent, as determined by petitioner in its appraisals, did not include any value special to the petitioner, but was a market value in the true sense of the term.

Of course, it was not error for the Court to consider a special use to which the land condemned might be put by the Government, if the same use was open to others, and if the property was adaptable and available for that special use, and there was a reasonable probability that it would be so used, and that probability had affected market price. *Boom Co.* v. *Patterson,* 98 U. S. 403; *Olson* v. *United States,* 292 U. S. 246; *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53.

Is There a Conflict Between the Fourth and Fifth Circuits as to Scope of Appellate Review Under Section 25 of the Tennessee Valley Authority Act?

The final reason urged by petitioner for the granting of a writ of certiorari is that there exists a conflict between decisions of the Fourth and Fifth Circuit Court of Appeals

as to the scope of appellate review by a Court of Appeals under Section 25 of the Tennessee Valley Authority Act.

That portion of Section 25 of the Act of 1933 (c. 32, 48 Stat. 58) which forms the basis for this contention reads as follows:

> "'. . . and the said circuit court of appeals shall upon the hearing on said appeal dispose of the same upon the record, without regard to the awards or findings theretofore made by the commissioners or the district judges, and such circuit court of appeals shall thereupon fix the value of the said property sought to be condemned."

In its opinion in this case, the Circuit Court of Appeals (118 Fed. (2d) 82-83), in discussing the scope of appellate review under the above language, said:

> "Question is raised at the outset as to the character of review provided by the statute. It is said that, because of the provision that we shall dispose of the case upon the record 'without regard to the awards or findings theretofore made by the commissioners or the District Judges,' the case is to be heard by us de novo and not as an appeal. We do not so interpret the statute. We are not authorized to take testimony, as are the judges of the District Court, but are to hear the case just as we hear other appeals upon the record made in the District Court. The judges and commissioners who took the testimony had the advantage of seeing and hearing the witnesses; and their findings, under well settled rules, are entitled to special weight on that account. The Commissioners visited the premises and they, as well as the judges, gave literally weeks and months to hearing a case which was heard before us in a single day. The trial court was thus in a better position than an appellate court could possibly be to determine questions of fact; and it is hardly reasonable to suppose that it was the intention of Congress that we should pay no attention whatever to the findings of that court. The reasonable construction of the statute, we think, is merely that we are not to be bound by the findings of the trial court, but are to

consider them in the light of the record, just as we consider similar findings in other appeals in which we have power to review the facts."

The respondent contends that the conclusion reached by the Court of Appeals below is proper, and its interpretation of the meaning of the language of the Act has heretofore been approved by this Court in declining to grant certiorari in the case of *Welch* v. *Tennessee Valley Authority* (108 Fed. (2d) 95, C. C. A. 6th), *certiorari denied* 309 U. S. 688.

Petitioner refers to four cases from the Fifth Circuit, all of them condemnation cases under the above Act, in which it is contended the Circuit Court of Appeals of that circuit made a different interpretation of the scope of appellate review under the Act from that of the Fourth Circuit quoted above. The cases are: *United States* v. *Reynolds*, 115 F. (2d) 294 (C. C. A. 5th); *Stephenson Brick Co.* v. *United States*, 110 F. (2d) 360 (C. C. A. 5th); *United States* v. *Harris*, 115 F. (2d) 343 (C. C. A. 5th); *Finley* v. *United States*, 118 F. (2d) 815 (C. C. A. 5th).

An examination of the four cases will disclose that in none of them did the Court of Appeals of the Fifth Circuit discuss the scope of appellate review under Section 25 of the Act. In several, if not all of the cases, the language of the section is more or less fully quoted, and in many, if not all of the cases, the Court in its opinion says that it has fixed the value of the property condemned without regard to the awards or findings of the Commissioners or the District Judges.

In one of the cases, however, namely, *Stephenson* v. *United States*, the Court says that "the total compensation fixed by the three District Judges is fair" and judgment is entered accordingly. In the report of the case in Federal Reporter, 2nd, it is stated that judgment is "affirmed".

It is submitted that thus far the Court of Appeals of the Fifth Circuit has refrained from setting out its opinion of the scope of review under the above Act.

On the other hand, attention is called to the case of *Welch* v. *Tennessee Valley Authority*, 108 Fed. (2d) 95,

certiorari denied 309 U. S. 688, which is also a condemnation case under the above Act, in which the Court in its opinion discusses at some length the scope of appellate review under the provisions of the Act saying:

> "The questions raised by the appellants relate exclusively to the weight and sufficiency of the evidence to sustain the judgment, and they insist that because of the provisions peculiar to the statutes under these proceedings, the burden rests on this Court to weigh the evidence as though sitting as a trial court, but we do not so construe the statute.
>
> "The Court, when sitting without a jury, may take into consideration the witnesses' sources of knowledge, their interest, good intentions, their seeming honesty, their respective opportunities for personal knowledge of the facts about which they testify and their conduct and manner on the witness stand. All of these things may be considered in determining the weight which should be given to a statement, some of which may be so adverse to the testimony of the witness as to justify a trial court in ignoring it. It follows that this Court, not having the opportunity to observe the witnesses and there being absent in the printed record the essentials for a judicial weighing of their testimony on appeal, will not reject the findings of the lower court unless it is apparent it has misapprehended the evidence or gone against its clear weight."

This interpretation by the Court of Appeals of the Sixth Circuit apparently met with the approval of this Court, and it is submitted that under its interpretation it goes further than the Court of Appeals of the Fourth Circuit has gone in indicating the extent to which the appellate court may consider and give weight to the opinions below.

It is interesting to note that the petitioner herein, in its brief filed in this Court in the *Welch* case in opposition to certiorari, has this to say:

> "On appeal by petitioners to the Circuit Court of Appeals for the Sixth Circuit that Court affirmed the

decree of the District Court." (Respondent's brief p. 3)

Also

"While the reasonable construction of this language (of section 25 of the Tennessee Valley Authority Act) would appear to be that the circuit court of appeals is to review the evidence and exercise its own independent judgment in arriving at *a final valuation, it seems unreasonable to suppose that Congress intended to impose a mandatory requirement that the appellate court shut its eyes to all prior proceedings or that the statute requires consideration of the printed evidence entirely disassociated from the prior proceedings in the case.*" (Brief pp. 8-9)

"*Moreover, the question is not of any general public importance. The statutory provisions in question are peculiar to the Tennessee Valley Authority Act.* . . . Although Commissioners' awards have been made in about 485 condemnation cases under the Act, only approximately thirty-five have been appealed to the three-judge district courts and only eight cases . . . have been appealed to any circuit court of appeals." (Brief p. 11)

The respondent herein agrees with the petitioner herein in its former opinion as to the scope of appellate review under Section 25 of the Tennessee Valley Authority Act as expressed in its brief in opposition in the *Welch* case.

There is certainly nothing in the position taken by petitioner on this point that should lead this Court to grant a writ of certiorari.

Conclusion.

For the reasons above stated it is respectfully submitted that the petition for writ of certiorari herein should be denied.

George Lyle Jones

George H. Wright

Of counsel for respondent.

APPENDIX.

2258(1) R. W. Bell

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct examination:

By Mr. Kresel:

Q. Mr. Bell, will you state for the record your residence and your occupation or profession? A. I live at Abingdon, Virginia, and I am an attorney.

Q. Have you any official connection, Mr. Bell, with a railroad located here in the state of North Carolina? A. I am president of the Tennessee & North Carolina Railway, which operates a road from Hayesville, North Carolina, to Murphy.

Q. Mr. Bell, how long have you been president of this railroad? A. A very short time. I succeeded my father as president, and my recollection is in the last, the latter part of August of this year.

Q. Did you say that that road ran from Hayesville to Murphy? A. If I did I was mistaken. It is Hayesville to Andrews, North Carolina.

Q. Now, Mr. Bell, does the estate of your father have any interest as stockholders in that road? A. Yes, the estate owns some stock in the road.

Q. Do you know how much stock is outstanding? A.
2259 I think 2500 shares.

Q. And are there any bonds? A. No bonds.

Q. Now, do you know the principal stockholders of the company? A. Yes.

Q. Tell us, if you will, Mr. Bell, briefly, as much as you know about this company? What rolling stock has it? A. The Tennessee & North Carolina Railroad Company at one

(1) The numbers on left hand side of page refer to the pages in Commissioner's transcript of record.

time had three divisions, one of which has been abandoned, known as the Hartford Division, which ran from Newport, Tennessee to Hartford, Tennessee.

The other ran from Hayesville, North Carolina to Andrews, North Carolina, and they operated a railroad known as the Smoky Mountain Railroad from Sevierville, Tennessee, to Knoxville, Tennessee. At the present time they own only the line known as the Hayesville Division, the Andrews Division, which runs from Hayesville to Andrews, and in connection with the operation of that particular division, we have two engines, and probably five or six flat cars, and a caboose, and a few hand cars. The rolling stock is not extensive on that particular division. We do have a couple of engines, I believe, on another division.

Q. We are particularly concerned, of course, about this division between Hayesville and Andrews. You say there
2260 are probably a couple of engines? A. Yes, there are two engines.

Q. And how many cars, did you say? A. I think, to be definite, I think it is five or six cars they have now.

Q. What kind of cars? A. What you call cattle cars.

Q. Cattle cars? A. Yes, it is the type of cars they carry cattle in, and we have one or two boxcars.

Q. And you spoke of flatcars, I think. Is that the same thing, when you speak of cattle cars? A. No, the cattle cars are——

Q. (Interrupting) Enclosed? A. Enclosed, Yes.

Q. And then you said there were some handcars? A. Yes, used by the section foremen.

Q. How many of those are there? A. My recollection is two.

Q. Now, is that the extent of the rolling stock on this Hayesville-Andrews Division? A. Approximately. I would not be very definite about it.

Q. Substantially? A. Substantially so, yes.

2261 Q. Now, the road, what kind of traffic does this road serve? A. Why, principally pulp wood and lumber going out of that territory around Hayesville to the Southern Railway, which is the railroad it connects with at Andrews.

Q. And do you know, Mr. Bell, how frequently the trains run on this road? A. Well, recently, I presume, we have been averaging——

Mr. Fowler: Do you know, Mr. Bell?

The Witness: I know approximately, sir. I get the reports. They have been averaging something like four or five trainloads a week. A trainload is about six cars.

Q. Now, does the road carry passengers? A. No, sir, we have not recently. I don't know whether it did formerly or not.

Q. I mean now. A. No.

Q. Now, Mr. Bell, is the road a profitable venture? A. It has not been recently, sir.

Q. Do you know, Mr. Bell, whether this road could be purchased? I mean the stock of it? A. Well, so far as the interests I represent, it could be, and I think the other interests would perhaps follow my recommendation.

2262 Q. If these interests owning the stock were offered $100,000 in cash for this Andrews-Hayesville branch, would you say that the stock could be acquired for that? A. I would say, as president of the company, I would recommend to the stockholders that the offer be accepted.

Q. And do you think that your recommendation would be followed? A. I believe it would.

Mr. Marks: Would you speak up, Mr. Bell, so that we can hear you?

Mr. Kresel: Suppose he reads it back to you.

Will you read it, Mr. Reporter?

(Question read as follows:

"If these interests owning the stock were offered $100,000 in cash for this Andrews-Hayesville branch, would you say that the stock could be acquired for that?")

Mr. Marks: We object to that question as being incompetent. This witness can not testify that such offer might be accepted. Such offer——

Chairman Mull: The objection is overruled. He has already answered the question.

Mr. Marks: Exception.

Chairman Mull: Note the exception.

Mr. Kresel: That is all, you may cross examine.

• • • •

Extract from Exhibit R. 254, at page 447.

SECOND DEFICIENCY APPROPRIATION BILL, 1937

Principal features of Chickamauga project

General:	
Location of Dam	Hamilton County, Tenn., 6 miles northeast of Chattanooga, Tenn.
Date work started	Jan. 13, 1936.
Closure date	December 1939.
Miles above mouth of river	471.0.
Length of reservoir	75 miles (59.0 to Watts Bar).
Normal reservoir area	32,000 acres.
Normal reservoir volume	541,000 acre-feet.
Drainage area	20,800 square miles.
Normal reservoir elevation	682 mean sea level.
Land acquisition and backwater protection:	
Land to be acquired	68,000 acres.
Communities affected	Dayton and Soddy, Tenn.
Reservoir clearing, maintenance, and protection:	
Reservoir clearing	7,200 acres.
Reservoir clearing, river bank	275 miles.
Miles of reservoir shore line	502 miles.
Highway relocation: Miles of highway	160.4.
Railroad relocation:	
Major bridges	1.
Other work	Embankment protection, Dayton, Tenn.
Other relocations:	
Families	2,000.
Graves	1,000.
Dam, lock, and powerhouse:	
Overall length of dam	6,025 feet.
Lock lift (maximum)	51 feet.
Lock chamber dimensions	60 by 360 feet.
Spillway capacity	600,000 cubic feet per second.
Spillway gates	20 by 40 by 38 feet.
Concrete	446,500 cubic yards.
Earth excavation	1,409,000 cubic yards.
Rock excavation	237,400 cubic yards.
Earth embankment	1,739,000 cubic yards.
Initial power installation	2 units of 25,000 kilowatts each.
Ultimate power installation	4 units of 25,000 kilowatts each.
Maximum height	104 feet.
Material and type	Earth embankment and concrete gravity.
Access roads	4.3 miles.
Employee housing: Cafeteria capacity	Small.
Channel improvements: Channel improvement.	Dredging below Chickamauga Lock and through bars to obtain 9-foot depth for minimum width of 300 feet. Construction of a low navigation lock and dam or raising of Hales Bar Dam.

POWER OF APPALACHIA DEVELOPMENT

AS ADOPTED BY

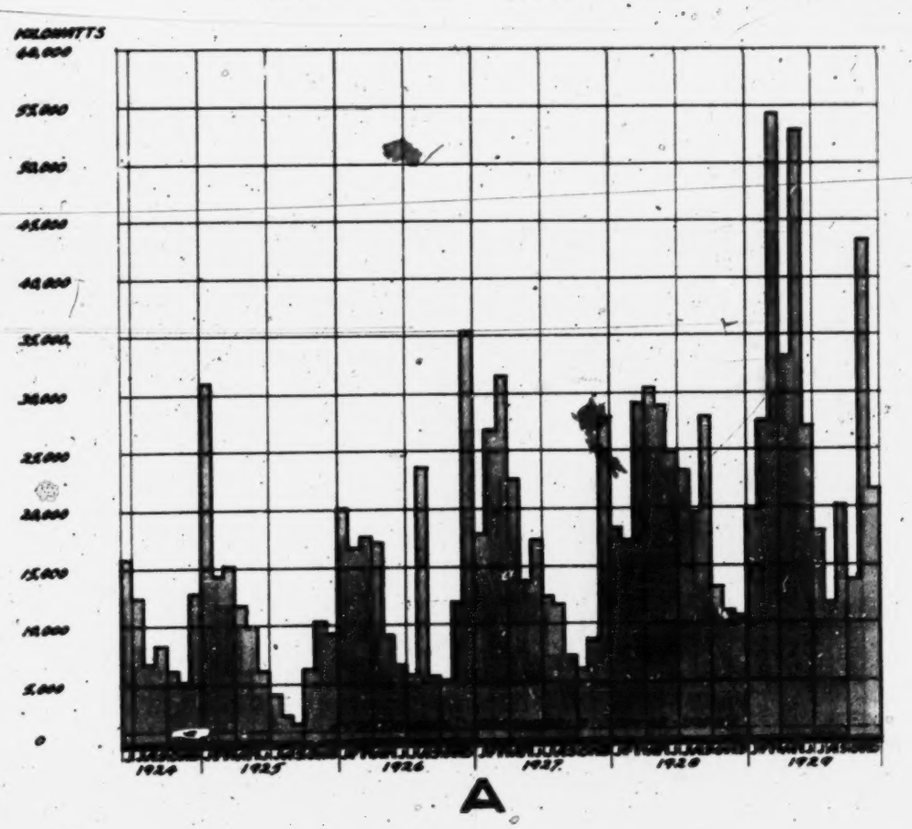
SOUTHERN STATES POWER Co.

A - WITHOUT BENEFIT OF ANY STORAGE

AND

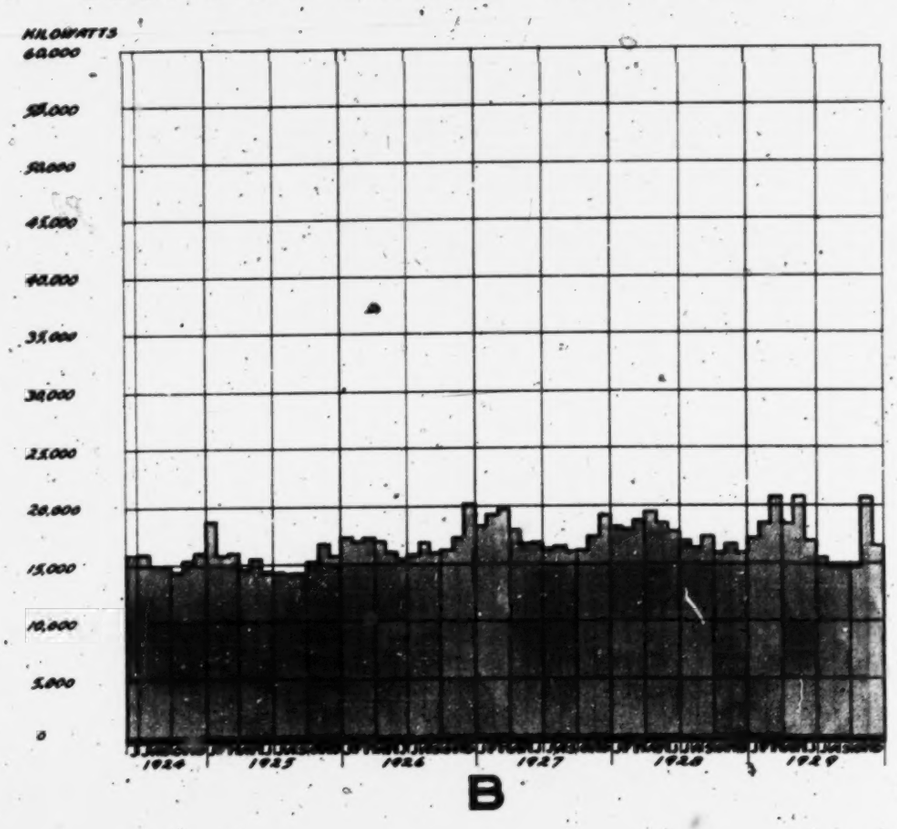
B - WITH BENEFIT OF STORED WATERS

FROM THE ADOPTED LOCATIONS OF SOUTHERN STATES POWER Co.



A

COLORED AREA SHOWS THE POSSIBLE AVERAGE MONTHLY GENERATION OF THE ADOPTED APPALACHIA DEVELOPMENT, WHEN NOT RECEIVING BENEFIT OF ANY STORED WATERS.



B

COLORED AREA SHOWS THE AVERAGE MONTHLY GENERATION OF THE ADOPTED APPALACHIA DEVELOPMENT WHEN OPERATING AS AN INTEGRAL PART OF THE 9 PLANT SYSTEM, INCLUDING POWELSON, MURPHY AND NOTTELY DEVELOPMENTS AS ADOPTED BY SOUTHERN STATES POWER Co., AND RECEIVING THE BENEFIT OF THEIR STORED WATERS.

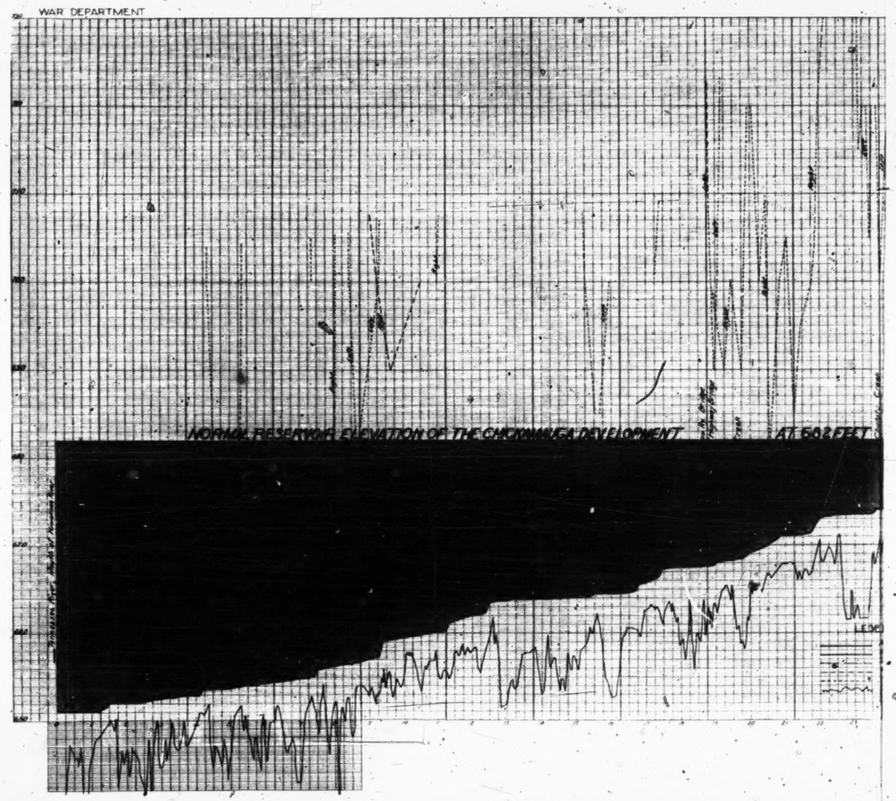
THE PERIOD COVERED (JUNE 1, 1924 - JAN 1, 1930) INCLUDES THE MOST ADVERSE CONDITIONS KNOWN FOR WATER POWER GENERATION ON THE HIWASSEE RIVER. GOVERNMENT CONTINUOUS DAILY STREAM FLOW RECORDS ON THE HIWASSEE RIVER EXIST BEGINNING APR 1910 AND ON THE TENNESSEE BEGINNING 1874. SEE CHART No 12

THE EFFECT OF THE DELIVERY OF STORED WATERS FROM THE ADOPTED RESERVOIRS OF SOUTHERN STATES POWER Co AT THE APPALACHIA SITE IS TO RAISE THE CONTINUOUS FIRM POWER OF THE APPALACHIA DEVELOPMENT FROM 1130 KW TO THE EQUIVALENT OF 16,300 KW OF CONTINUOUS FIRM POWER WHEN OPERATING AS AN INTEGRAL PART OF THE ADOPTED 9 PLANT SYSTEM - AN INCREASE OF 14.2 TIMES.

CHART 28

EXHIBIT R-229

WAR DEPARTMENT



CORPS OF ENGINEERS U.S. ARMY

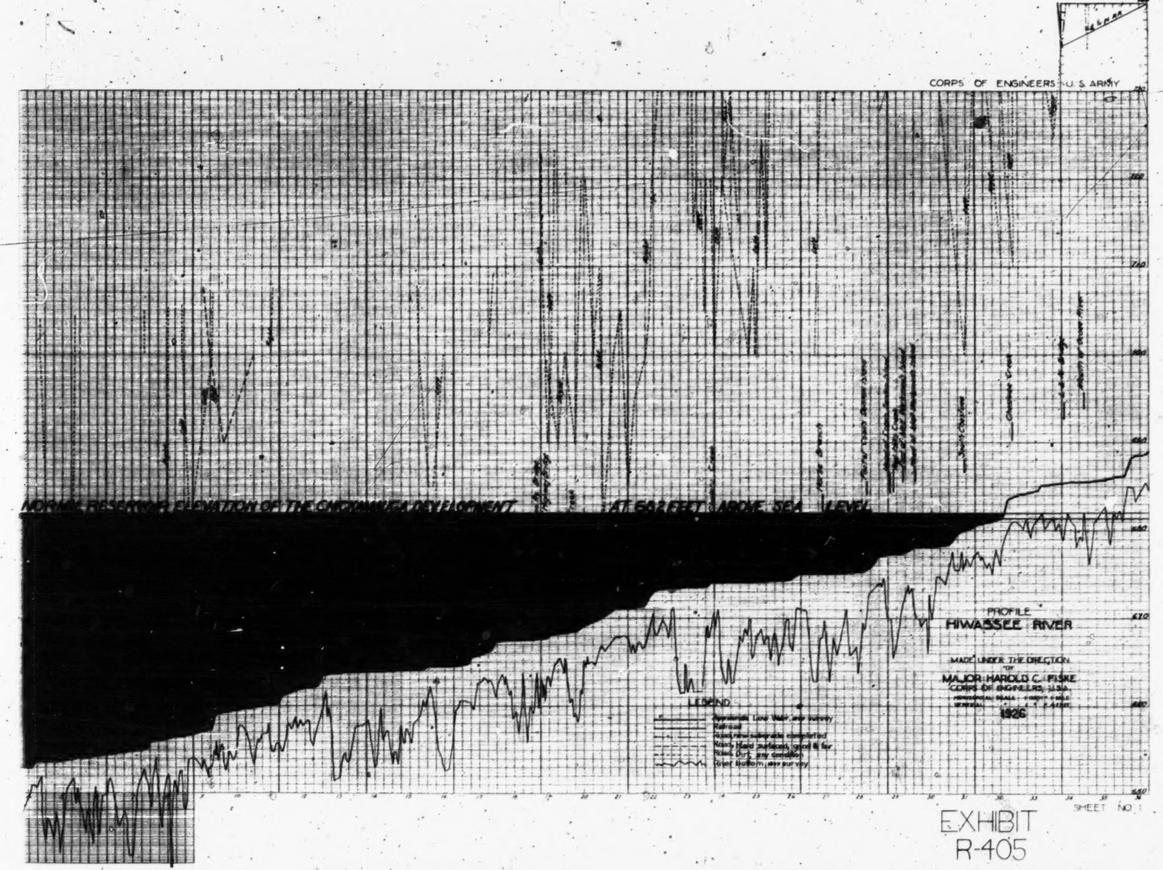
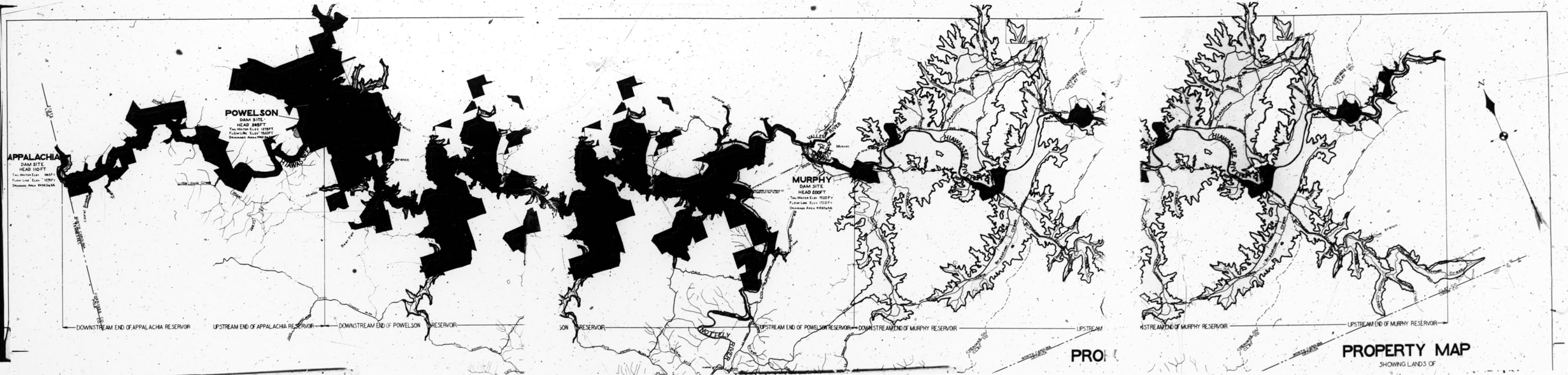
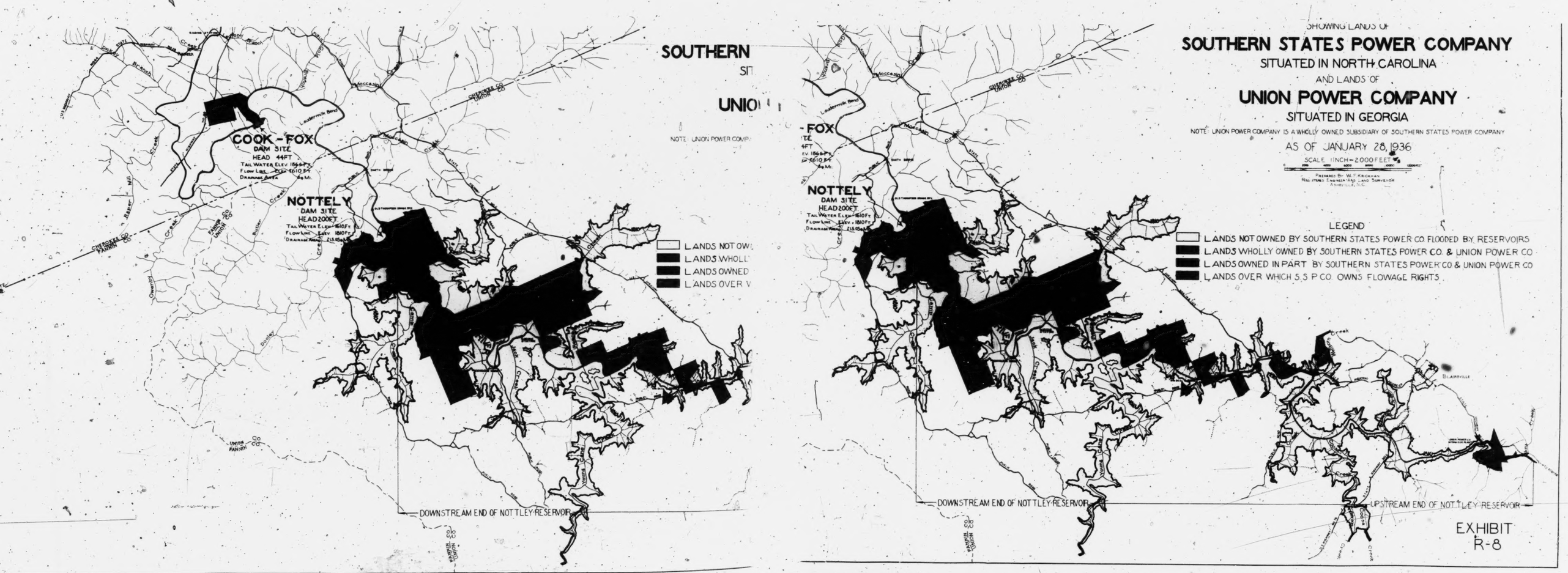


EXHIBIT
R-405


APPALACHIA
DAM SITE
HEAD 110FT
POWELSON
DAM SITE
HEAD 248FT
MURPHY
DAM SITE
HEAD 200FT
HIWASSEE RIVER
DOWNSTREAM END OF APPALACHIA RESERVOIR
UPSTREAM END OF APPALACHIA RESERVOIR
DOWNSTREAM END OF POWELSON RESERVOIR
UPSTREAM END OF POWELSON RESERVOIR
DOWNSTREAM END OF MURPHY RESERVOIR
UPSTREAM END OF MURPHY RESERVOIR
PROPERTY MAP
SHOWING LANDS OF


SOUTHERN
SIT
UNIO
NOTE: UNION POWER COMP
COOK-FOX
DAM SITE
HEAD 44FT
TAIL WATER ELEV 1556FT
FLOW LINE ELEV 1610FT
DRAINAGE AREA 49 Sq Mi.
NOTTELY
DAM SITE
HEAD 200FT
TAIL WATER ELEV 1610FT
FLOW LINE ELEV 1810FT
DRAINAGE AREA 215 Sq Mi.
LANDS NOT OWN
LANDS WHOLL
LANDS OWNED
LANDS OVER V
DOWNSTREAM END OF NOTTLEY RESERVOIR
-FOX
TE
4FT
EV 1556FT
EV 1610 FT
49 Sq Mi.
NOTTELY
DAM SITE
HEAD 200FT
TAIL WATER ELEV 1610FT
FLOW LINE ELEV 1810FT
DRAINAGE AREA 215 Sq Mi.
DOWNSTREAM END OF NOTTLEY RESERVOIR
UPSTREAM END OF NOTTLEY RESERVOIR
BLAIRSVILLE
SHOWING LANDS OF
SOUTHERN STATES POWER COMPANY
SITUATED IN NORTH CAROLINA
AND LANDS OF
UNION POWER COMPANY
SITUATED IN GEORGIA
NOTE: UNION POWER COMPANY IS A WHOLLY OWNED SUBSIDIARY OF SOUTHERN STATES POWER COMPANY
AS OF JANUARY 28, 1936
SCALE 1 INCH = 2000 FEET
PREPARED BY W. F. KRICKMAN
REGISTERED ENGINEER AND LAND SURVEYOR
ASHEVILLE, N.C.
LEGEND
LANDS NOT OWNED BY SOUTHERN STATES POWER CO FLOODED BY RESERVOIRS
LANDS WHOLLY OWNED BY SOUTHERN STATES POWER CO. & UNION POWER CO
LANDS OWNED IN PART BY SOUTHERN STATES POWER CO & UNION POWER CO
LANDS OVER WHICH S.S.P.CO. OWNS FLOWAGE RIGHTS
EXHIBIT
R-8